CF0000058564

(2)

XII-188/(Jail)
C.J.P.R.—5,000-9-81

CRA 1195 / 94

APPEAL OF PRISONER

Division Bench (Criminal)

No. 168 Name लोरसिंह

Father's name करबूस

Residence लपकरा थाना कुरसाथल Age 23

Sentenced to आजीवन कारावास on 8/7/94 ST NO. 24/93

Under section 302 भादवि by श्री एस के गुप्ता

अपर सत्र न्यायाधीश उदयपुर नगर।

B 31694

it is explained to the prisoner that if he states or wishes to be represented by a legal practitioner the Appelate Court will not proceed with the base for seven days unless the legal practitioner appears. If the legal practitioner does not appear with in seven days he may not be heard at all If the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

1 Date of Application for copy of Judgement 8/7/94

2 Date of which copy received 10/7/94

3 Date on which Appeal sent 18/7/94

4 Whether the prisoner wishes to be represented or not – Yes/~~No.~~

No. 168 Name लोरसिंह उ० करबूस

Continued in Sub Jail Rajpur Rajgarh

No. 650 dated 18/7/94 198

Forwarded to the CHIEF JUDICIAL MAGISTRATE Rajgarh

to gather with a copy of judgement or order passed in the case for favour of transmission to the proper Appilliate Court.

Superintendent Central/ Distt./ Sub-Jail

Date of receipt in C. J. M.'S Office

Date of receipt of record to accompany

Memo of Appeal of the Appeliate Court.

No. 2/CJM Rajgarh Dated 21/7/94 198

Forwarded to the Submitted to SJ Rajgarh (Cmp)

C.J.Magistrate (सी. जे. मजपेयी)
मुख्य न्यायिक दण्डाधिकारी
राजगढ़ (म. प्र.)

Date of receipt in Appliate Court 31/7/94

(P.T.O.)

(13)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Criminal Appeal No. 1195 OF 1994

Plasidas

Vs.

State of M.P.

JUDGEMENT FOR CONSIDERATION

Sd/-
DHIRENDRA MISHRA
Judge

HON'BLE SHRI L.C.BHADOO ,J.

Sd/-
L.C. BHADOO
Judge

POST FOR JUDGMENT ON JANUARY 2006

Sd/-
Dhirendra Mishra
Judge

(14)

HIGH COURT OF CHHATTISGARH: BILASPUR

Division Bench: Hon'ble Shri L.C.Bhadoo
& Hon'ble Shri Dhirendra Mishra, JJ

Criminal Appeal No. 1195 of 1994

Appellant : Plasidas

Vs.

Respondent : State of Madhya Pradesh

Appellant by Ms. Sangeeta Mishra, Advocate.
State by Shri Akhil Mishra, Panel Lawyer.

J U D G M E N T
(Delivered on 31st/01/2006)

Per Dhirendra Mishra, J

This is the prisoner's appeal from jail under Section 374(2) of the Code of Criminal Procedure as he has been convicted and sentenced to undergo life imprisonment under Section 302 of the Indian Penal Code for intentionally causing homicidal death of Teophil Lakda, by learned Additional Sessions Judge, Jashpurnagar in S.T.No. 74/93 vide judgment dated 08.07.1994.

2. The case of the prosecution in brief is that Ranjeetram Lohar (P.W.1) of Village-Jabla lodged the report of Ex.P/1 on 28.11.1992 in Police Station-Tapkara informing that about 6.00 a.m. he found the dead body of Teophil Lakda which was lying under the Mahua tree. He informed about the same to Sarpanch namely Devprasad and came to lodge the report along with him. It is further mentioned in the First Information Report that after lodging of the report Plasidas reached there and confessed that he has

(15)

killed Teophil by sal-club at about 21 hours in the previous night as he was involved in wrong act with his mother which he could not tolerate. After registering the offence the police initiated investigation and during investigation inquest of Ex.P/2 over the dead body of the deceased was performed after issuing notice to the witnesses. Dead body was sent for autopsy to Primary Health Centre, Tapkara. Dr. B.C.Paikra (P.W.4) conducted postmortem and submitted his report of Ex.P/7 in which he found 1) lacerated wound over left parietal region size 3" x 2.5 c.m. scalp deep; 2) lacerated wound 4" below the left knee joint size 2.5" x 3 c.m. and 3) blood was oozing from the left ear. All the injuries were caused within 24 -36 hours. He also found left parietal bone fractured and that all the injuries were caused by hard and blunt object. He opined that death of the deceased was due to coma due to blood collection in between brain surface and duramater and the death was homicidal in nature. Plain and bloodstained soil and piece of wood containing blood were seized from the spot vide Ex.P/3. Memorandum of the accused was recorded vide Ex.P/4 and in pursuance of the memorandum the weapon of offence i.e. club was seized at the instance of the appellant vide Ex.P/5. Bloodstained Lungi was seized from the appellant vide documents of Ex.P/6. Opinion of Dr. Paikra (Ex.P/8) regarding the club seized from the appellant was obtained. Spot map of Ex.P/9 was got prepared by Halka Patwari.

3. After completion of the investigation the police filed charge sheet against the appellant in the Court of Judicial Magistrate First Class, Jashpurnagar, who in turn committed the case to the Court of Sessions Judge, Raigarh and the same was received on transfer by the learned Additional Sessions Judge, Jashpurnagar for trial.

4. Learned Additional Sessions Judge framed charge under Section 302 of the IPC. The appellant abjured his guilt.

5. Prosecution in order to establish its case examined 10 witnesses in all and thereafter statement of the accused/appellant under Section 313 of the Cr.P.C. was recorded. The accused denied the circumstances appearing against him in the prosecution case. After hearing the arguments of the Additional Public Prosecutor and counsel for the accused/appellant, learned Additional Sessions Judge convicted and sentenced the appellant as mentioned above. Conviction is on the basis of circumstantial evidence as there is no eyewitness to the incident. The circumstances relied upon by the learned Additional Sessions Judge to convict the appellant are summarized as under;

a) that the deceased had illicit relationship with the mother of the appellant which was in the knowledge of the appellant and he did not approve the same and as such the appellant had strong motive for committing the above offence.

b) That the appellant was spotted alive in the company of the deceased last time when Tersa (P.W.6) and Fransis Lakda (P.W.7) heard the singing voice of the appellant and sound of beating and in the next morning they learnt that appellant has killed the deceased.

c) That the appellant had confessed his guilt before Imil (P.W.3) that he had killed Teophil Lakda and this fact is also mentioned in the First Information Report of Ex.P/1.

6. Learned counsel for the accused/appellant has challenged the above findings on the ground that witness Vinay Kumar is the only eyewitness to the incident, however, he has not been examined by the prosecution and there is no explanation for his non-examination and as such adverse inference ought to have been drawn against the prosecution for non-examination of the only

eyewitness of the incident. It is further argued that the Court below has acted upon the statements of P.W.6 and P.W.7 though in their statements there are material discrepancies. The Court below has wrongly relied upon the entry appearing in the FIR where confession of the appellant to his guilt is recorded. It is further argued that the alleged extra judicial confession before P.W.3 Imil could not be believed as this witness in paragraph 3 of his cross-examination has categorically stated that the accused never met him and he did not disclose anything.

7. Relying upon the judgment of the Supreme court in the matter of **Hem Raj and others Vs. State of Hariyana** reported in **2006 AIR SCW 1885** it is argued by counsel for the appellant that where the independent witnesses were available and were not examined by the prosecution without any explanation, such non-examination, is a serious infirmity in the prosecution case and adverse inference ought to have been drawn against the prosecution.

8. On the other hand, learned counsel for the State supports the impugned judgment of the trial Court.

9. We have heard learned counsel for the respective parties.

10. The homicidal death Teophil Lakda is not in dispute.

11. It is settled law that when a case rests upon the circumstantial evidence such evidence must satisfy the following tests;

i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii) These circumstances should be of definite tendency, unerringly pointing towards guilt of the accused.

iii) those circumstances, taken cumulatively, should form a chain so complete that there is no escape from the

conclusion that within all human probability the crime was committed by the accused and none else; and

iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

12. We propose to scrutinize the case in hand in the light of the above tests. So far as the motive attributed to the appellant for committing the offence is concerned, the same rests on the statement of P.W. 3 Imil Kuzur who has stated in paragraph 1 of his statement that the deceased had illicit relationship with the mother of the accused and he has further stated that Panchayat was convened and both the parties were fined. This witness has nowhere stated that the appellant nourished ill-will towards the deceased for the above reason. On the contrary, from the statement of P.W. 6 Tersa it appears that there was complete harmony between the appellant and his parents and the deceased and his wife. This witness has stated in paragraph 1 of her statement that her father took Teophil (husband of her mother's sister) and his wife to the house of accused. No other witness including the complainant Ranjeet has either stated that the deceased had illicit relationship with the mother of the accused or because of this relationship, accused nourished ill-will towards the deceased.

13. So far as the circumstance of appellant being last seen with the deceased when he was alive is concerned, for establishing this fact the prosecution has examined P.W. 6 Tersa and P.W. 7 Fransis. Tersa in her statement has stated that 30-35 guests were present in her mother's house to celebrate some function; there they consumed Hadiya (home made intoxicant). Deceased

Teophil and appellant also took Hadiya. Deceased (husband of her mother's sister) and his wife were also present there and her father took the deceased and his wife to the house of accused at about 5.00 p.m. and returned. The accused left her house after some time. One hour after their departure she went with Fransis- her brother-in-law to the house of accused and retuned to her *Mayka* . Till that time accused had also returned his house. When Tersa was returning with her father towards *Mayka* at the same time accused was going with the deceased to leave him to his house as he had said that he would take him to his house. We (Tersa and her father) were coming from the other way whereas the accused and the deceased were coming from another way. She hears that accused was singing by calling Teophil Pagla and was also assaulting. She also states that sound of beating was coming. Then she says only Vinay went towards the source of sound and they did not accompany him. Vinay came in the night to their house but did not tell anything. She learnt that Vinay had visited her house along with accused on the same night but she had left for her in-laws home.

14. If we closely scrutinize the above statements, we may deduce that this witness went to the house of the accused with her brother-in-law Fransis at about 6.00 p.m. and returned with her father towards *Mayka* and at the same time accused was going with the deceased from some other way and while they were following some different track, they heard the accused singing and the sound of assaulting the deceased. It also appears that Vinay was also accompanying them and he went towards the source of voice. However, it appears that the fact that deceased and his wife went to the house of the accused was missing in her diary statement of Ex. D/1. She further states in her paragraph 3 of her cross-examination that she returned with her brother-in-law alone. She further states that on the next day she learnt that somebody has killed Teophil and she cannot say as to who killed him. She

further admits that the voice of the person heard by them was similar to that of Plasidas, however, he could be other person also. P.W. 7 Fransis Lakda-brother-in-law of P.W.6 Tersa has stated that he had gone to village Jhilbarna i.e. his-in-law's house and at that time accused as also deceased Teophil were there. Teophil is the husband of sister of his wife's mother. They consumed Hadiya, thereafter the guests left for their houses and he went with her sister-in-law Tersa to the house of Imil where Teophil and accused were also present. They again took Hadiya from Imil's house. While they along with Tersa, Vinay were returning to Matiyas house, they heard the sound of beating and singing. The person who was assaulting was singing also and the voice of the singer was similar to that of the accused. Vinay went towards the source of sound. In the next morning he learnt that the accused has killed Teophil.

15. Thus if we scrutinize the statements of these two witnesses we find material discrepancy in their accounts. Where witness Tersa states that she was returning to her parents house along with her father, Vinay and her brother-in-law from the house of accused, the incident took place on some other way while P.W.7 Fransis states that they were in fact returning from the house of Imil along with his sister-in-law Tersa and Vinay and on way they heard the sound of beating and singing.

16. If the two witnesses are to be believed then it is also to be believed that the accused was accompanying their own *Mousa* and the accused was going to leave their *Mousa* to their house and therefore, had they heard the voice of the accused and further the sound of beating, they would have definitely gone towards the source of sound and ascertained about the fact. Therefore, the conduct of the above witnesses is absolutely unnatural and hence unreliable. The discrepancy in their statements regarding place from where the appellant took the deceased also throws serious

doubt on their accounts. Tersa states that she went to the house of the accused along with Fransis whereas Fransis states that he never went to the house of the accused and further states that they went to the house of Imil, took Hadiya. Thus, except the above two witnesses there is no other witness to the fact of last seen together of the appellant and the deceased while the deceased was alive and therefore, we are of the considered opinion that the prosecution has failed to establish the factum of last seen together by leading cogent and reliable evidence.

17. The third circumstance relied upon by the prosecution is the extra judicial confession made by the appellant before P.W.3 Imil. In paragraph 1 this witness has stated that accused works with his mother and he called him in his thrashing field and confessed that he has killed Teophil. However, in paragraph 3 of his cross-examination he has admitted that he never met accused and the accused did not tell him anything. He has further stated that it is true that because the accused had come to know that the deceased had illicit relationship with his mother, therefore he has been falsely implicated on the basis of suspicion.

18. Thus looking to the contradictory statements of this witness in his examination-in-chief and cross-examination, no credence can be given to the alleged extra judicial confession made by the appellant before this witness. The Court below was not correct to rely upon the statement of this witness for the purposes of extra judicial confession.

19. The Court below in paragraph 13 of its judgment has referred to portion of the FIR wherein it is mentioned that the accused had informed Ranjeet that he has killed Teophil and this portion has not been challenged by the defence side, therefore taking aid with the document of Ex.P/1 it has been held that the prosecution has proved its case. The above finding of the learned Additional Sessions Judge cannot be sustained as FIR is not a substantive

piece of evidence and it can simply corroborate or contradict its maker. Since Ranjeetram (P.W.1) the maker of the FIR has not stated anything regarding confession by the appellant before him, any stipulation regarding confession present in the FIR is of no consequence and the accused cannot be convicted on the basis of such stipulation in the FIR. Confession before police at the time of recording FIR is also inadmissible.

20. Lastly, from the statements of P.W. 6 and P.W.7 it is evident that Vinay Kumar was the only eyewitness to the alleged incident who was accompanying the above witnesses and who went towards the source of sound and thereafter returned to the house of Tersa in the night along with the accused. However, for the reasons best known to the prosecution this witness has not been examined and we do not find any explanation for non-examination of this important witness. We have already arrived at the conclusion that the prosecution has failed to establish individual circumstances relied upon for proving the guilt of the accused. The non-examination of Vinay Kumar, the only eyewitness of the incident compels us to draw adverse inference against the prosecution as it is the bounden duty of the prosecution to examine all material witnesses particularly when there is no allegation that if produced, he would not speak the truth. Circumstance of this witness being withheld from the Court casts a serious reflection on the fairness of the trial. In the instant case Vinay Kumar was the only most important witness who could throw some light towards the true circumstances. However, his non-examination could also prejudice the defence of the accused.

21. The Supreme Court in the matter of **Habib Mohd. Vs. State of Hyderabad** reported in **AIR 1954 S.C. 51** while considering non-examination of material witness has held that it is the bounden duty of the prosecution to examine the material witness, particularly when no allegation has been made, that if produced,

he would not speak the truth. Not only adverse inference arises against the prosecution case for his non-production as a witness in view of illustration (g) to Section 114 of the Evidence Act, but the circumstances of his being withheld from the Court casts a serious reflection on the fairness of the trial.

22. Similarly, in the matter of **Ram Prasad and Others Vs. State of Uttar Pradesh** reported in **AIR 1973 S.C. 2673** in paragraph 13 it has been held that it is no doubt true that the prosecution is bound to produce witnesses who are essential to unfolding of the narrative on which the prosecution is based, however, it cannot be laid down as a rule that it a large number of persons are present at the time of the occurrence, the prosecution is bound to call and examine each and every one of those persons. The answer to the question as to what is the effect of non-examination of a particular witness would depend upon the facts and circumstances of each case.

In the instant case Vinay Kumar is the only eyewitness who allegedly went towards source of sound and his non-examination is fatal.

23. The Supreme Court in the matter of **Gajendra Singh Vs. State of U.P.** reported in **AIR 1975 S.C. 1703** while considering the effect of non-examination of the most material evidence has further held that where the defence fails to examine the most material witness to prove the defence version and no explanation for the non-examination has been given by the defence, the non-examination of such witness is the strongest possible circumstance to discredit the defence version because she alone could have been in the best position to explain whether the version of the defence is true or not.

24. The Division Bench of the Madhya Pradesh High Court in the matter of **Niran Vs. State of M.P.** reported in **1988 J.L.J. 505** has reiterated the affect of non-examination of the material witness by

the prosecution and held that the prosecution has failed to establish the true circumstances under which the offence was committed.

25. As already stated we have discussed in detail the discrepancies present in the statements of witnesses examined by the prosecution to establish individual circumstances on the basis of which they were connecting the appellant with the offence. Apart from the aforementioned discrepancies the non-examination of Vinay Kumar, the only eyewitness and the witness of prevailing circumstances throws serious doubt on the case of the prosecution.

26. Thus on the basis aforesaid discussions, we are of the opinion that the prosecution has utterly failed to connect the appellant with the alleged offence on the basis of circumstantial evidence. Accordingly we allow the appeal of the appellant, set aside the impugned judgment of conviction and order of sentence passed by the trial Court and acquit the appellant of charges framed against him and direct to set him at liberty forthwith, if not required in any other case.

Sd/-
L.C. BHADOO
Judge

Sd/-
Dhirendra Mishra
Judge